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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on January 5, 1955.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App., *infra*, 1a-3a) is reported at 218 F. 2d 524.

JURISDICTION

The judgment of the court of appeals (App., 4a) was entered January 5, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Respondent power company held an unutilized flowage easement across a tract of land riparian to an interstate navigable river. Congress determined that the United States should exercise its dominant navigation servitude in the stream and should undertake construction of a multipurpose river basin project. The federal project will result in flowage of water over the land in question and, therefore, respondent's easement has been condemned.

The question presented is whether the condemnee (respondent) may assert against the United States a claim of value for its easement which depends entirely upon the assumption of a right to harness the waters of the navigable stream.

STATUTE INVOLVED

The Act of December 22, 1944, c. 665, 58 Stat. 887-888, 891-892, 894, provides in pertinent part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers;

to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

* * * * *

Sec. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view towards providing an adequate reservoir of useful and worthy public works for the postwar construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein * * *.

* * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document

Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir [name changed to "John H. Kerr Dam and Reservoir," 65 Stat. 616, 617] on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

STATEMENT

The essential facts may be summarized as follows:

The Dan River, the principal tributary of the Roanoke River, is a navigable stream.[1] In 1944, Congress, declaring its intention "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized," approved projects in various areas of the country, including a general plan for the comprehensive development of the Roanoke River Basin as "recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session" (*supra*, pp. 2-4). By the same Act and in implementa-

[1] The district court made no findings of fact. Respondent, however, has not challenged the well-established fact (see S. Rept. No. 83, 80th Cong., 1st Sess. (1947), p. 1; H. Doc. No. 65, 74th Cong., 1st Sess. (1935), p. 25) that the Dan is navigable. The court of appeals' opinion assumes navigability of the river (App., 2a).

tion of the plan, Congress authorized "the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina [now known as John H. Kerr Dam and Reservoir]" (*ibid.*), the project here involved. As stated in House Document 650, the specific navigation purposes of the project are "regulation of stream flow" and "assur[ing] the necessary minimum low flows" for completion of the channel between Palmyra Landing and Weldon in North Carolina (pp. 8-9, 76-77). The other principal objectives are flood control and power production (pp. 8-9, 80-81).

By a suit instituted in the United States District Court for the Western District of Virginia, the United States proceeded to condemn, *inter alia*, a flowage easement over a certain tract, riparian to the Dan River, required for use in connection with the operation of the John H. Kerr Dam and Reservoir (R. 1-18).[2] The estate acquired was the full right "to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, Tract No. FF-3100E * * *" (R. 5). The issue is the compensability of the easement condemned.

It is conceded that respondent's interest in the tract was limited to a flowage easement which it

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[2] "R" references are to the "Appendix for the United States" filed in the court of appeals.

obtained from the owner in fee [3] for possible future power-dam and reservoir purposes.[4] The Government contended that it was not required to pay compensation for this interest because the value of the right conferred by the easement necessarily depended upon utilization of the waters of the navigable stream. (R. 30-31.) Respondent claimed that its right was a valuable one "due to the location of the land involved and its availability, at the time of the taking and in the reasonably near future, for water power development purposes" (R. 28).[5] It claimed further that the value of its easement was substantially equivalent to the value of the entire fee.

Accepting respondent's claim that it was entitled to compensation as against the United States and holding that "the value of these flowage rights was the fee simple value of the land" (R. 56), the district court awarded the sum of $61,000 (exclusive of interest), which was the full fee simple value of the land as estimated by one of respondent's witnesses (R. 37-39).

The court of appeals affirmed. As to the threshold issue—whether one may assert against the

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[3] The owner in fee is not involved. She agreed to convey to the Government any flowage rights she may have retained, for the consideration of one dollar (R. 71-82; App., 2a).

[4] There is no claim by respondent that its easement had value for any other purposes.

[5] At the trial, respondent conceded that it had no "right in the flowage of the stream at all" (R. 64). Thus, its claim is rested upon the utility of the land involved (across which it held a flowage easement) for dam or water-development purposes.

United States a claim of value which depends upon harnessing the waters of a navigable stream—the court of appeals ruled in the affirmative, relying, without further discussion, upon its decision in *United States* v. *Twin City Power Company,* 215 F. 2d 592, certiorari granted, 348 U. S. 910. It also sustained the district court's determination that the value of the condemned easement was measurable by the value of the entire fee.

REASONS FOR GRANTING THE WRIT

The central issue in this case is the same one which is before the Court in *United States* v. *Twin City Power Company,* No. 463, certiorari granted, 348 U. S. 910. The question presented by *Twin City* is stated in the Government's petition in that case as follows:

> When the United States, exercising the power of eminent domain, condemns land on a navigable river for a project in aid of navigation, is the condemnee entitled to receive, as an element of just compensation for "private property" taken, a special increment based upon the land's adaptability to use as a site for hydroelectric power operations?

In the instant case, the condemnee (respondent) was the holder of a lesser interest: a flowage easement. In claiming compensable value for this interest, it asserts, like the respondent power company in *Twin City,* that it may predicate a right to compensation upon "value for dam or water power

development purposes" (R. 28). In its brief filed with the court of appeals, it asserted (p. 5) that this right was assured to it by the Fourth Circuit's decision in *Twin City,* 215 F. 2d 592. The court of appeals shared this view and disposed of the issue summarily on the express authority of its earlier *Twin City* holding.[6]

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[6] For the reasons briefly indicated in this note, we believe that the court's error in holding in favor of compensability was compounded when it held that respondent was entitled to compensation measured by the value of the fee. We do not urge this as a separate ground for granting the writ, but wish to reserve the right to present the point in the event that the Court grants the writ and sets the case down for argument.

There is no finding that there was a reasonable probability that respondent's flowage easement, which had lain dormant for many years, would be utilized by respondent, and certainly no finding which would justify equating respondent's interest with the value of the entire fee. The court below relied upon the fact that the Government, as condemnor of the easement, will overflow the land. But the value of the easement in the Government's hands is not the test (even if it were, there would still be the necessity of offsetting the benefits conferred by the project upon the fee owner's adjoining lands, see R. 36); plainly, under the decisions of this Court, the public need pay only for what the condemnee has lost. *Bauman* v. *Ross*, 167 U.S. 548, 574.

The court of appeals sought to buttress the allowance of fee value to the easement-holder by pointing to the fact that the fee owner was willing to convey to the Government for one dollar such flowage rights as she retained (App., 3a). But there is nothing in the record to support the notion that the fee owner's land was valueless while respondent had an outstanding easement, or that the fee owner so regarded it. So far as the record indicates, it appears that Mrs. Olive Vaughan Williams, the fee owner, was content to have an artificial lake on a comparatively small portion of her estate, because this would enhance the attractiveness and value of her remaining lands which constitute "a wonderful hunting preserve and a wonderful timber growing preserve" (R. 36). For this reason, it

As pointed out in the Government's petition in No. 463, the question presented is one of broad public importance; the Fourth Circuit's position on this question appears irreconcilable with principles established by this Court's decision in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; and there is a direct conflict between the Fourth and the Ninth Circuits. The reasons for granting the writ in *Twin City* are applicable in equal degree here. We suggest, however, that the Court may find it appropriate to hold the instant petition pending decision on the merits in No. 463.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1955.

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would seem, she has not seen fit to claim that the value of the tract directly involved was diminished as a result of condemnation of the flowage easement over that tract.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6839

UNITED STATES OF AMERICA, APPELLANT

v.

2979.72 ACRES OF LAND, MORE OF LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG

Argued October 13, 1954

Decided January 5, 1955

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

PARKER, Chief Judge:

This is another appeal in condemnation proceedings had in connection with the John H. Kerr Dam and Reservoir, a flood control project on the Roanoke River in Virginia and North Carolina. The Virginia Electric and Power Company held flowage easements over 1540 acres of land belonging to Mrs. Olive Vaughan Williams. The government filed a declaration of taking with respect to this land corresponding in all respects with the declaration of taking filed in the case of *United States* v. *2648.31 acres of land, more or less, in the Counties*

of Charlotte and Halifax, Virginia, J. P. Stevens & Co., et al., this day decided. Mrs. Williams had agreed to convey any interest she may have had in the land to the government for the nominal consideration of one dollar. The court held that the power company was entitled to recover from the government the fee simple value of the land, which was found to be $40 per acre, and on this basis entered judgment in favor of the power company and against the government for the sum of $61,600. The government has appealed from this judgment, contending (1) that there can be no recovery against the government for rights which would have value only in connection with the development of water power on a navigable stream, and (2) that, at all events, the government is liable, not for the fee simple value of the land, but for the difference between its value with and without the servitude resulting from the easement which the government is acquiring.

On the first question thus raised, we think that the position of the government is wrong for reasons fully set forth in our opinion in *United States* v. *Twin City Power Co.,* 4 Cir. 215 F. 2d 592, which need not be repeated here.

On the second question, this case differs from *United States* v. *2648.31 Acres of Land, etc., supra,* this day decided, in that what is being taken here is the flowage easement of the power company, which was to flood permanently the entire 1540 acres of land, leaving no use of any value in the owner of the fee. The trial judge was justified, therefore, in valuing the flowage rights of the power company over the 1540 acres which were

destroyed by the government's taking as being measured by the fee simple value of the land which would be thus overflowed, since the value of flowage rights is the difference between the value of the land with and without the servitude imposed by the flowage easement. The fact that under the taking by the government there would be only an intermittent flooding of some portions of the 1540 acres is immaterial, since the flowage rights of the company were rendered worthless by the government's taking and their value must be the basis of the company's compensation. To state the matter simply, the power company is entitled to compensation for its flowage right easement which is destroyed by the government's taking. That easement was to flood completely the 1540 acres of land. The evidence is that the land which without this servitude would have a value of $40 per acre would have no value at all with the servitude imposed. It was doubtless for this reason that the owner was willing to convey her interest in the fee to the government for the nominal consideration of one dollar.

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6839

UNITED STATES OF AMERICA, APPELLANT

vs.

2979.72 ACRES OF LAND, MORE OF LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, APPELLEES

Appeal from the United States District Court for the Western District of Virginia

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

January 5, 1955.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

Filed Jan. 5, 1955. R. M. F. Williams, Jr., Clerk.

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HAROLD B. WILLEY, Clerk

No. 41

In the

Supreme Court of the United States

October Term, 1954

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

There is no question here of a landowner obtaining some "special increment" of value over and above fair market value because of adaptability for hydroelectric operations, which this Court consented to review in *Twin City*, October Term, 1954, No. 463. The question here, of less frequent occurrence, is whether the purchaser of a right to overflow land permanently shall be compensated when his right is taken many years later for public use by the Government. Unlike *Twin City*, this question is not of general importance and the writ should be denied. In any event the case should not be held for subsequent disposition *sub silentio* after *Twin City*, but if the special facts here involved merit review at all, that should be accomplished by granting the writ and receiving briefs and argument.

The issue presented in this case was limited to whether or not a property interest in land (an easement to permanently flood it) had value. Respondent claimed it did and presented evidence, *which Petitioner did not even attempt to refute or contradict*. There being no other evidence, the District Court accepted Respondent's evidence and the Court of Appeals affirmed the award. Respondent did not seek to recover value based upon a right to use the water in the river, but on the contrary, sought to recover the value of the easement without the right to use the water.

The Petition for Writ of Certiorari states an issue extraneous to this case, and therefore the remainder of the Petition speaks of some fancied case which may at some other time arise, but which has not arisen here.

II.

STATEMENT

The facts of the case were summarized by the District Court. Addressing the Government's attorney, that court said (R. 64-65):

> "THE COURT: I think Mr. Miller's view, as I interpret it, is this, that the Dan River, being a navigable stream, no private power company has a right to obstruct (sic) or build a dam there except under license from the Federal Power Commission, and if they undertook to acquire rights of that sort, they have no validity. Therefore, they can attribute no value to them here.
>
> "But the fact remains, as I see it, that for years—this thing of the assertion of the navigability of all of these streams all over the country has been a matter of rather recent development, and for years dams were built across that river and in the river without any permission from the War Department or any governmental permission at all. I assume that the persons who originally acquired these flowage rights did so of course in good faith, and they paid money for them. I wish I knew how much they had paid, but it appears that it cannot be analyzed to determine. But the Government comes along, Mr. Miller, and undertakes now to overflow 1850 acres of land in which the Virginia Electric and Power Company already had flowage rights in 1540, as I understand.
>
> "The present owner of that land, Mrs. Williams, I believe, has proceeded on the theory that she had no interest in the 1540 acres because she has already conveyed—because the Virginia Electric and Power Company already has flowage rights over it and she is granting you an option to flood to the 330 foot contour for the sum of $1.00, if I am correct in that.
>
> "MR. FERRELL: Yes, sir.

"THE COURT: Your position is that inasmuch as Virginia Electric and Power Company, according to your contention, has no rights upon which a value can be placed that you get the whole right to overflow 1840 acres of land for $1.00 without paying anybody for it.

"I cannot accept that viewpoint. Whether or not the Virginia Electric and Power Company built a dam there and exercised its flowage rights without license from the Federal Power Commission is a question. It possibly couldn't have. But the fact is that they had purchased or acquired a valuable right there, something in which they had invested money. I cannot accept the viewpoint that it has no value at all and that the Government should be allowed, therefore, to get the flowage rights over this entire tract of 1840 acres for $1.00 which they paid to this Mrs. Williams and which she accepted because she thought that she or her predecessor had disposed of her flowage over all of the 1840 acres.

"That seems to me to be the situation. I do not see any use in prolonging the entry of judgments in these cases. You have left me a right difficult proposition here, so far as the valuation of that land is concerned, because I am compelled to accept, so far as the larger tract is concerned, the 1540 acres, the valuations of these Power Company appraisers. No dispute about it, there is no evidence. The Government is content to rest on its legal propositions and not dispute the valuations of the land, and I am compelled to accept them. I accept them with a little hesitancy because I think they were very considerably exaggerated when they came to talk about that 3.35 acres of land. And I am a little fearful that there may be some exaggeration of values as to the 1540. But I do not see that I can do anything else."

III.

ARGUMENT

The record is clear that Respondent has never based its claim for compensation upon hydroelectric value, or as part of a power project, or upon the flow of a navigable stream; but, on the other hand, Respondent has contended successfully that its easement was valuable as an interest in land and the evidence showed, without contradiction, that Respondent's easement, as such, had value.

Respondent has not received, nor has it urged at any stage of the case, that there was any "special increment" of value based upon the utilization of the water of a navigable stream. Therefore, the issue in this case is not the same as the one which is before the Court in *United States* v. *Twin City Power Company*, No. 463, certiorari granted 348 U. S. 910, where the question presented, as stated in the Government's petition in that case, is whether "the condemnee is entitled to receive as an element of just compensation for 'private property' taken, a special increment based upon the land's adaptability to use as a site for hydroelectric power operations."

Plainly the decision in this case does not stand or fall with *Twin City*.

Respondent also takes issue with Petitioner's contention that the question presented here is one of broad public importance; that the Court of Appeals' position on this question appears irreconcilable with principles established in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; and that there is a direct conflict between the Fourth and the Ninth Circuits. Similar contentions were made and were completely rejected by the Court of Appeals for the Fifth Circuit in *United States of America* v. *Twin City Power Company*

of Georgia, et al. (Case No. 15084, 1955, as yet unreported), where the Court of Appeals concluded:

> "The findings of the district court based on the overwhelming weight of the evidence established the fact that these properties were adaptable and needed for water power purposes, and had been held by them over the years for such use. They have been taken for and devoted to that use by the government. No good reason exists why the land owners should be deprived of their full market value merely because they border on a technically navigable stream. On the contrary, considerations of justice and of constitutional right require that they not be so deprived.
>
> "Sophistry and wishful thinking aside, the matter is just that simple. Appellant, moving under the ostensible purpose and right of taking the property of appellees for the improvement of navigation but the real purpose and right of taking it for a water power development, the same purpose for which the appellees bought and are holding it, if successful will defeat the fundamental principles as they are declared in the Fifth Amendment to the Constitution by taking private property without paying just compensation therefor.
>
> "The appellees, on the other hand, pressing their claim on the basis of the real facts underlying and supporting their contention, are seeking just compensation only for that which they have and own and which may, therefore, not be taken from them without paying just compensation therefor."

In the instant case, the Government has attempted unsuccessfully to acquire by condemnation from Respondent a perpetual easement to flood permanently 1540 acres of land for the nominal consideration of one dollar, having acquired similar rights, subject to Respondent's servitude, from the owner of the underlying fee for the nominal sum of one

dollar (R. 71-82, especially at page 77). As the circuit court said in the instant case (App. 3a):

> "To state the matter simply, the power company is entitled to compensation for its flowage right easement which is destroyed by the government's taking. That easement was to flood completely the 1540 acres of land. The evidence is that the land which without this servitude would have a value of $40 per acre would have no value at all with the servitude imposed. It was doubtless for this reason that the owner was willing to convey her interest in the fee to the government for the nominal consideration of one dollar."

Since this case presents only the matter of the proper appraisal of an easement, it is submitted that it does not present any question of general interest.

IV.

CONCLUSION

The petition should be denied.

Dated May 3, 1955.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

By RALPH H. FERRELL, JR.
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No. 41. UNITED STATES *v.* VIRGINIA ELECTRIC & POWER CO. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U. S. 222. *Solicitor General Sobeloff* for the United States. *Ralph H. Ferrell, Jr.* and *Francis V. Lowden, Jr.* for respondent. Reported below: 218 F. 2d 524.